

PENNSTATE



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Shoba Sivaprasad Wadhia
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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FILED

FEB 10 2012

*Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia*

SHOBA SIVAPRASAD WADHIA
1407 Ridge Master Drive
State College, PA 16803-3163
814-234-4512

Plaintiff

v.

Case: 1:12-cv-00231
Assigned To : Collyer, Rosemary M.
Assign. Date : 2/10/2012
Description: FOIA/Privacy Act

UNITED STATES DEPARTMENT OF HOMELAND SECURITY
Office of the General Counsel
20 Massachusetts Ave., NW
Washington, D.C. 20528

And

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT
500 12th St., SW
Washington, D.C. 20536
Washington, D.C.

Defendants

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Shoba Sivaprasad Wadhia ("Plaintiff") brings this action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for injunctive and other appropriate relief to enforce her right to agency records from Defendants Department of Homeland Security ("DHS") and Immigration and Customs Enforcement ("ICE"). Specifically, Plaintiff seeks release of agency records concerning prosecutorial discretion and deferred action.
2. "Prosecutorial discretion" authorizes the DHS to decide whether to exercise its enforcement powers against someone and as a practical matter, affects thousands of

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Angela D. Cesar, Clerk of Court
U.S. District Court, District of Columbia

noncitizens. Beneficiaries of prosecutorial discretion may avoid removal and in some cases are eligible to apply for work authorization. One form of prosecutorial discretion is “deferred action.” Neither the immigration statute nor the regulations contain eligibility criteria for seeking a favorable grant of prosecutorial discretion. Similarly, unlike most formal applications for discretionary forms of relief from removal, acts of prosecutorial discretion lack an application form. Prosecutorial discretion can be exercised by DHS at any stage of the immigration enforcement process.

JURISDICTION

1. This court has subject matter jurisdiction over this action and personal jurisdiction over the parties under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

VENUE

2. Venue in this district is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

3. Party Shoba Sivaprasad Wadhia is the founder/director of Pennsylvania State Law’s Center for Immigrants’ Rights, an immigration policy clinic where students produce practitioner toolkits, white papers, and primers of national impact on behalf of client organizations. Professor Wadhia researches the role of prosecutorial discretion in immigration law; the association between detention, removal and due process; and the intersection between immigration, national security, and race. Professor Wadhia teaches or has taught asylum and refugee law, immigration law, and a clinical course on immigration law and policy.
4. Defendant DHS is a Department of the Executive Branch of the United States government and is an “agency” within the meaning of 5 U.S.C. § 552(f)(1). ICE is a component within Defendant DHS. ICE is responsible for reviewing and adjudicating cases for deferred action. Plaintiff seeks records in order to determine what kinds of

factors are contributing to a favorable (or unfavorable) grant of deferred action as well as related policies and procedures.

Plaintiff's FOIA REQUEST

5. On October 6, 2009, Plaintiff filed a FOIA requesting for all records and policies involving prosecutorial discretion. See Exhibit A.
6. ICE sent an acknowledgement letter on November 19, 2009, assigned a control number to the request, and stated that ICE had “queried the appropriate program offices within ICE for responsive records.” See Exhibit A.
7. ICE sent another letter on November 30, 2009, stating that the October 6, 2009 request was “overly broad” and requesting clarification. See Exhibit A.
8. Plaintiff sent a clarifying letter on December 19, 2009, less than thirty days after ICE requested clarification. See Exhibit A.
9. On February 3, 2010, an on-line status check indicated that the October 2009 request was “administratively closed” on December 30, 2009, because there was “no response to letter requesting additional information.” See Exhibit A.
10. On March 30, 2010, Plaintiff filed a new FOIA request to ICE containing an expanded request for information on prosecutorial discretion and deferred action. See Exhibit B.
11. On July 12, 2010, Plaintiff sent a follow up e-mail to ICE for a status update on the March 30, 2010, request, but no response was received. In November, 2010, Plaintiff and ICE corresponded by e-mail and telephone about the request.
12. In January 2011, Plaintiff received a package from ICE which held only a single compact disc. The disc contained only a single chart identifying a handful of active deferred

action cases between the years of FY 2003 and 2010. This chart is pasted below and, if complete, indicates that ICE granted less than 500 deferred action cases between 2003 and 2010.

*C. Chart Provided by ICE: Number of Active Cases granted
Deferred Action Status Since CY 2003*

CY	Detained	Non Detained	Total
2003	0	117	117
2004	0	68	68
2005	0	62	62
2006	0	64	64
2007	0	71	71
2008	0	39	39
2009	2	34	36
2010	1	15	16
Total	3	470	473

As of HDS November 29, 2010 as provided by the Statistical Tracking Unit.

Data only reflect Deferred Action Granted and Case Status Active (i.e. open cases) Data cannot be reported for Deferred Action Granted, Case Status inactive (i.e. closed cases)

13. Plaintiff contacted ICE by phone and e-mail in February, 2011, and at the time learned that ICE had mistakenly sent the disc without a letter.
14. ICE sent electronically a formal decision letter on February 9, 2011. The letter (dated December 17, 2010) stated that a full search of the ICE Office for Enforcement and Removal yielded the single chart above. See Exhibit B.
15. Concerned in part that ICE did not make a complete search, Plaintiff filed an appeal with ICE on March 29, 2011, hoping to receive more data. As to the adequacy of its search, the appeal letter highlighted the data immigration lawyer and scholar Leon Wildes was able to retrieve in the late 1970s and early 2000s and also indicated:

Responsive records [to my FOIA request] exist that were not included in ICE's response. Specifically, records on deferred action are required to be maintained under the Detention and Removal Operations and Procedure Manual § 20.8(c). The Manual provides that all deferred action considerations be summarized using a Form G-312 and placed in the alien's A-file. Decisions regarding grants and denials of deferred action must also be in writing and signed by an agency official making the determination. Production of these records would be responsive to the original FOIA request, even if redaction were required to protect an individual's privacy interests

See Exhibit C.

16. Plaintiff contacted ICE by telephone about the FOIA appeal on May 18, 2011, May 24, 2011 and on July 27, 2011.
17. In a letter dated September 27, 2011 ICE denied Plaintiff's appeal regarding the adequacy of ICE's search. According to the letter, ICE conducted an additional search on remand of the Office of the Principal Legal Advisor (OPLA) and found that no records were responsive. See Exhibit C.

CAUSE OF ACTION

Violation of Freedom of Information Act for Failure to Disclose Responsive Agency Records

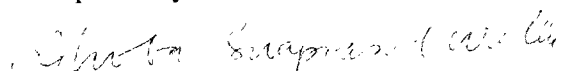
18. Plaintiff repeats, alleges, and incorporates allegations 1-17 as if fully set forth herein
19. Plaintiff has a legal right under the FOIA to obtain the agency records requested since October 2009, and there exists no basis for ICE's failure to make available such records.
20. ICE's failure to make promptly available the records sought by Plaintiff's requests violates FOIA, 5. U.S.C. § 552(a)(3)(A), (a)(6)(A)(i), and (a)(6)(C).
21. Plaintiff has exhausted all applicable administrative remedies with respect to ICE's wrongful withholding of the requested records. 5 U.S.C. § 552(a)(6)(C)(i).
22. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the requested documents. 5 U.S.C. § 552(a)(4)(B).

WHEREFORE, Plaintiff prays for this Court:

1. Order Defendant DHS and its component, ICE to disclose the requested records in their entireties and make copies available to Plaintiff;
2. Expedite this action pursuant to 28 U.S.C. § 1657(a);
3. Grant such other relief as the Court may deem just and proper

Dated: January 3, 2012

Respectfully Submitted,


Shoba Sivaprasad Wadhia

ICE Exhibit A

12 0231

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Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

October 6, 2009

Immigration and Customs Enforcement
Freedom of Information Act/Privacy Office
800 North Capitol Street, NW, Room 585
Washington, DC 20536-5009

Dear Sir or Madam:

Pursuant to the Freedom of Information Act, I hereby request the following information:

1. current internal guidance regarding the use of prosecutorial discretion;
2. current distribution list for guidance on prosecutorial discretion;
3. content of, frequency of, and audience for trainings for use of prosecutorial discretion;
4. records of all grants of prosecutorial discretion after Jan. 1, 2003;
5. records of all requests for prosecutorial discretion after Jan. 1, 2003 and the results of those requests;
6. records of all denials of prosecutorial discretion after Jan. 1, 2003; and
7. method of recordkeeping for prosecutorial discretion decisions

In order to help determine my status to assess fees, you should know that I am affiliated with an educational institution and that this request is made for a scholarly purpose and not for commercial use.

I would also like to request a waiver of fees under 5 U.S.C. § 552(a)(4)(A)(iii) because this information is sought in order to increase public understanding of the operations of the government and not primarily in the commercial interest of the requester. The requested information will be used to prepare a scholarly article detailing discretionary decisions in immigration enforcement. This article is also intended to aid those who may be subject to such discretionary decisions and to increase understanding of department decisionmaking not subject to public notice rules.

Thank you for your consideration.

Sincerely,

Shoba Sivaprasad Wadhia
Professor and Director, Center for Immigrants' Rights
Pennsylvania State University, Dickinson School of Law
Lewis Katz Building
University Park, PA 16802
(814) 865-3823

U.S. Department of Homeland Security
Washington, DC 20536



U.S. Immigration
and Customs
Enforcement

November 19, 2009

Shoba Wadhia
Pennsylvania State University, Dickinson School of Law
Lewis Katz Building
University Park, PA 16802

Re: 2010FOIA1069

Dear Mrs. Wadhia:

This acknowledges receipt of your October 6, 2009, Freedom of Information Act (FOIA) request to the Immigration and Customs Enforcement (ICE), requesting the following information:

1. current internal guidance regarding the use of prosecutorial discretion;
2. current distribution list for guidance on prosecutorial discretion;
3. content of, frequency of, and audience for training for use of prosecutorial discretion;
4. records of all grants of prosecutorial discretion after Jan. 1, 2003;
5. records of all request for prosecutorial discretion after Jan. 1, 2003 and the results of these request;
6. records of all denials of prosecutorial discretion after Jan. 1, 2003; and
7. method of record keeping for prosecutorial discretion decisions. Your request was received in this office on November 19, 2009.

Due to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request. Per Section 5.5(a) of the DHS FOIA regulations, 6 C.F.R. Part 5, the Department processes FOIA requests according to their order of receipt. Although DHS' goal is to respond within 20 business days of receipt of your request, the FOIA does permit a 10-day extension of this time period. As your request seeks numerous documents that will necessitate a thorough and wide-ranging search, DHS will invoke a 10-day extension for your request, as allowed by Title 5 U.S.C. § 552(a)(6)(B). If you care to narrow the scope of your request, please contact our office. We will make every effort to comply with your request in a timely manner; however, there are currently 397 open requests ahead of yours.

Provisions of the Act allow us to recover part of the cost of complying with your request. We shall charge you for records in accordance with the DHS Interim FOIA regulations as they apply to non-commercial requesters. As a non-commercial requester you will be charged 10-cents a page for duplication, although the first 100 pages are free, as are the first two hours of search time, after which you will pay the quarter-hour rate (\$4.00, \$7.00, \$10.25) of the searcher. We will construe the submission of your request as an agreement to pay up to \$25.00. You will be contacted before any further fees are accrued.

We have queried the appropriate program offices within ICE for responsive records. If any responsive records are located, they will be reviewed for determination of releasability. Please be assured that one of the processors in our office will respond to your request as expeditiously as possible. We appreciate your patience as we proceed with your request.

Your request has been assigned reference number **2010FOIA1069**. Please refer to this identifier in any future correspondence. You may contact this office at (202) 732-0300 or (866) 633-1182.

Sincerely,

A handwritten signature in black ink, appearing to read 'Catrina M. Pavlik-Keenan', is positioned above the printed name.

Catrina M. Pavlik-Keenan
FOIA Director

U.S. Department of Homeland Security
800 North Capital Street, Suite 585
Washington, DC 20536



U.S. Immigration
and Customs
Enforcement

November 30, 2009

Shoba Sivasprasad Wadhia
Pennsylvania State University
Dickinson School of Law
Lewis Katz Building
University Park, PA 16802

Re: 10FOIA1069

Dear Ms. Wadhia,

This letter seeks clarification of your Freedom of Information Act (FOIA) request, dated October 6, 2009, to U.S. Immigration and Customs Enforcement (ICE). We acknowledged receipt of your request on November 19, 2009. A copy of this letter is attached for your convenience.

Your request seeks:

1. current internal guidance regarding the use of prosecutorial discretion;
2. current distribution list for guidance on prosecutorial discretion;
3. content of, frequency of, and audience for trainings for use of prosecutorial discretion;
4. records of all grants of prosecutorial discretion after Jan. 1, 2003;
5. records of all requests of prosecutorial discretion after Jan. 1, 2003, and the results of those requests;
6. records of all denials of prosecutorial discretion after Jan. 1, 2003; and
7. method of recordkeeping for prosecutorial discretion decisions.

Records requested through the FOIA must be described in reasonably sufficient detail to enable government employees who are familiar with the subject area of the request to locate records without placing an unreasonable burden upon the agency. For this reason, § 5.3(b) of the DHS regulations, 6 C.F.R. Part 5, requires that you describe the records you are seeking with as much information as possible to ensure that our search can locate the records with a reasonable amount of effort. Whenever possible, a request should include specific information about each record sought, such as the date, title or name, author, recipients, and or subject matter of the records, if known, or the DHS component or office you

believe created and/or controls the records. The FOIA does not require an agency to create new records, answer questions posed by requestors, or attempt to interpret a request that does not identify specific records.

After careful review of your FOIA request, we have determined that your request is overly broad. The ICE FOIA Office will require additional information regarding the types of records you seek. "Prosecutorial discretion" is a broad term and is often used to describe a wide variety of decisions made during the exercise of ICE's statutory law enforcement authority. The ICE FOIA Office requests that you define what you mean by the term "prosecutorial discretion," to guide the agency in conducting its search in response to your FOIA request. Please also provide the categories of decisions in which prosecutorial discretion may be used in the immigration and customs law enforcement context for which you seek information.

If we do not hear from you within 30 days from the date of this letter, we will assume you are no longer interested in this FOIA request, and the case will be administratively closed. Please be advised that this action is not a denial of your request and will not preclude you from filing other requests in the future.

All FOIA requests and correspondence should be sent to my attention at the ICE FOIA Office either by fax 202-732-0310, email ICE-FOIA@dhs.gov or mail at 800 North Capital Street N.W., Room 585, Washington, D.C. 20536 to ensure immediate response.

Your request has been assigned reference number 10FOIA1069. Please refer to this identifier in any future correspondence. If you have any questions or concerns, you may contact this office at (202)732-0300.

Sincerely,



Catrina M. Pavlik-Keenan
FOIA Director

December 19, 2009

Caterina M. Pavlik-Keenan
FOIA Director
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
800 North Capital St., Suite 585
Washington, D.C. 20536

Re: 10FOIA1069

Dear Ms. Pavlik-Keenan:

Pursuant to your request for clarification regarding the FOIA request submitted Oct. 6, 2009, below is a description of the types of decisions involving the use of prosecutorial discretion that I am interested in. I have also attached a copy of the article I have written on the subject for further clarification if needed. The final version of this article will be published in the forthcoming issue of Connecticut Public Interest Law Journal and is therefore not to be reproduced or distributed without the permission of the Journal.

I would like to request records or data (at both a macro and individual level) concerning the favorable exercises of prosecutorial discretion, which contain information regarding the individuals, their equities, circumstances, factors considered, etc., in the following circumstances:

1. agency refraining from to issuing, serving, or filing a Notice to Appear (NTA)
2. agency refraining from enforcing law based on particular offenses or conduct
3. agency refraining from stopping, questioning, and arresting particular conduct/individuals
4. agency refraining from or releasing individuals from custody
5. agency seeking expedited removal or other forms of removal by means other than a removal proceeding
6. agency settling or dismissing a proceeding
7. agency granting deferred action or staying a final order
8. agency agreeing to voluntary departure, withdrawal of an application for admission, or other action in lieu of removing the alien
9. agency refraining from executing a removal order.
10. other favorable exercises of prosecutorial discretion for which the agency keeps records

In addition, I am interested in reviewing agency training materials and memoranda (and the frequency with which such materials are disseminated to field officers) used by the agency in determining whether a favorable exercise of discretion should be made. Finally, I am interested in reviewing materials relating to the oversight of prosecutorial discretion including but not limited to the performance measures used by the agency to gauge whether prosecutorial discretion has been exercised appropriately.

If additional information is needed, or you have any further questions regarding this request, please email me at ssw11@psu.edu, or call me at my office (814) 865-3823. Thank you for your consideration.

Sincerely,

ICE: FOIA Status

Page 1 of 1

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U.S. Immigration
and Customs
Enforcement

U.S. Immigration and Customs Enforcement

FOIA

ICE FOIA Status

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Status information is updated on a daily basis

The number you entered is: 2010FOIA1069

Your request was processed on 12/30/2009

Processor: PENDING

Date received: 11/19/2009

FOIA Recv'd Via: Mail

Date of Request: 10/6/2009

Process Type: Simple

Disposition of Request: Administratively Closed

no response to letter requesting additional information from requester

Last Modified: Wednesday, February 3, 2010

ICE Exhibit B

12 0231

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FEB 10 2012

Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

PENNSTATE



Center for Immigrants' Rights
Shoba Sivaprasad Wadhia, Director

The Dickinson School of Law
The Pennsylvania State
University
121 Lewis Katz Building
University Park, PA 16802

Office: 814-865-3823
Fax: 814-863-7274
centerforimmigrantsr@dsl.psu.edu

March 30, 2010

U.S. Citizenship and Immigration Services
National Records Center, FOIA/PA Office
P. O. Box 648010
Lee's Summit, MO 64064-8010

FOIA Office, U.S. Immigration and Customs Enforcement
800 North Capital St., NW
5th Floor, Suite 585
Washington, DC 20536

U.S. Customs and Border Protection
FOIA Division
799 9th Street NW, Mint Annex
Washington, DC 20229-1177

Dear FOIA Officers:

This letter constitutes a request pursuant to the Freedom of Information Act, 5 U.S.C. § 552, submitted by Shoba Sivaprasad Wadhia. Expedited processing of this request is made pursuant to 5 U.S.C. § 552(a)(6)(E) and agency regulations, and a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). This request is being simultaneously sent to U.S. Citizenship and Immigration Services (CIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Patrol (CBP).

Background

The use of the nonpriority program was revealed by the former Immigration and Naturalization Service (INS) in 1975 as a consequence of *Lennon v. INS*, 527 F.2d 187(2d Cir. 1975). Leon Wildes, counsel to Lennon in this case, has since written extensively about the nonpriority program.¹ Because it was believed Lennon was charged with deportation for

¹ See Leon Wildes, The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act, 14 SAN DIEGO L. REV. 42 (1977); Leon Wildes, The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules? 17 SAN DIEGO L. REV. 99, 101 (1980); Leon Wildes, The United States Immigration Service v. John Lennon: The Cultural Lag, 40 BROOK. L. REV. 279 (1974); Leon Wildes, The Nonpriority Program of the Immigration and Naturalization Service: A Measure of the Attorney General's Concern for Aliens, Part I, 53 INTERPRETER RELEASES 25 (January 26, 1976); Leon Wildes, The Nonpriority Program of the Immigration and Naturalization Service: A Measure of the Attorney General's Concern for Aliens, Part II, 53 INTERPRETER RELEASES 33 (January 30, 1976).

political reasons, Lennon requested for nonpriority status, among other forms of relief. Through Wildes, Lennon spent more than one year trying to gather information from INS about the nonpriority status program and related procedures. At the time, INS contended that data on the nonpriority status program was not compiled. Ultimately, Lennon was able to obtain information through a Freedom Of Immigration Act (FOIA) action. As a consequence of the FOIA Action, and despite the numerous statutory exceptions to the publication of information, INS migrated information about the nonpriority program from the INS unpublished Blue Sheets to the published White Sheets signifying the newly public nature and existence of the program.

Following the Lennon case, the INS issued guidance on deferred action (formerly referred to as "nonpriority") in 1975 under its Operations Instructions. The governing section stated: "In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category."² The Operations Instructions also listed factors that should be considered in determining whether a case should be designated for deferred action.

Consistent with INS' intent, even after the Operations Instruction on deferred action was removed, the factors outlined in the Instruction for deferred action continued to be utilized. As described in a leading treatise on immigration law and procedure, "While the deferred action program is still an internal administrative arrangement, with no provision for an application or participation by the alien, it is appropriate for the alien or the alien's counsel to call to the attention of the district director the circumstances of a particular case, with appropriate documentation, and to request that consideration be given to placing it in deferred action status."³

For the Lennon case, and later published in the San Diego Law Review, Leon Wildes examined 1,843 nonpriority cases approved through December 31, 1974, finding that humanitarian considerations (as opposed to the nature of the individual's deportation ground or activity which gave rise to such a ground) played an overriding role in an immigration officer's decision to grant or deny nonpriority status.⁴ In 2003, for his article *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*,⁵ Wildes requested and obtained records of 499 cases completed prior to 2003 involving deferred action from the regional BCIS offices. From these records, he was able to compile the data and distinguish the factors considered by BCIS in determinations of whether to grant or deny deferred action. Wildes' findings indicated that an individual, subject to final order of removal could be considered for deferred action when no other forms of relief seem possible, but removal would represent a grave injustice and was able to identify several factors (e.g., hardship to family, youth, infirmity, negative publicity, mental or physical health issues, etc.), which decision-makers

² Operations Instructions of the (Legacy) Immigration and Naturalization Service, OI § 103.1(a)(1)(ii) (1975).

³ CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 72.03(2)(h) (2009).

⁴ Wildes, Nonpriority Goes Public, *supra* note 1, at 52.

⁵ *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 San Diego L. Rev. 819 (2004).

considered in deferred action cases.

The purpose of the instant request is to follow up and expand upon on Wildes' research and to identify potential patterns and trends in deferred action cases in order to provide practical knowledge for those who may benefit from deferred action. Because the decisions are not made in a public forum, public scrutiny is also necessary to ensure consistency of agency action. In both regards this information will benefit the agency by increasing efficacy and efficiency in immigration proceedings.

Records Requested

1. records regarding the following information from cases after January 1, 2003 in which deferred action status was granted:
 - a. number of individuals granted deferred action status
 - b. factors considered in each case
 - c. determinative factors in each case that deferred action status should be granted
2. records regarding the following information from cases after January 1, 2003 in which an individual made a request for deferred action status:
 - a. number of individuals who made requests for deferred action status
 - b. number of individuals granted deferred action status
 - c. number of individuals denied deferred action status
 - d. status of cases in which deferred action as neither granted nor denied
 - e. reasons for denial or granting of deferred action status
 - f. factors taken into consideration to determine whether deferred action status should be granted or denied
3. records regarding the following information from cases after January 1, 2003, in which an individual did not make a formal request to be considered for deferred action status, but was considered for deferred action status:
 - a. number of individuals considered for deferred action status who had not made a request
 - b. number of these individuals who were granted deferred action status
 - c. number of these individuals who were denied deferred action status
 - d. status of cases in which deferred action as neither granted nor denied
 - e. reasons for denial or granting of deferred action status
 - f. factors taken into consideration to determine whether deferred action status should be granted or denied
4. records regarding the following information from cases after January 1, 2003 in which an individual was denied deferred action status:
 - a. number of individuals denied deferred action status
 - b. reasons for denial of deferred action status
 - c. factors taken into consideration to determine that deferred action status should be denied

5. records regarding the following information from cases after January 1, 2003 in which an individual qualified as part of a group eligible for deferred action status:
- a. number of individuals who were in fact considered for deferred action status
 - b. number of these individuals who were granted deferred action status
 - c. number of these individuals who were denied deferred action status
 - d. status of cases in which deferred action as neither granted nor denied
 - e. reasons for denial or granting of deferred action status
 - f. factors taken into consideration to determine whether deferred action status should be granted or denied
 - g. number of individuals who request deferred action status

Requestor

Shoba Sivaprasad Wadhia is a clinical professor and director of the Center for Immigrants' Rights at Penn State Dickinson School of Law whose area of scholarly research and writing includes deferred action. The Center for Immigrants' Rights is an immigration clinic whose mission is to represent immigrants' interests through legal excellence, advocacy, education, and collaboration with key stakeholders and the community. This request is made for a scholarly purpose and not for commercial use.

Fee Waiver

A waiver of fees is requested under 5 U.S.C. § 552(a)(4)(A)(iii) because this information is sought in order to increase public understanding of the operations of the government and not primarily in the commercial interest of the requester. The requested information will be used to prepare a scholarly article and to further the public understanding of deferred action status and its applicability to individuals facing immigration action.

Expedited Processing

Also requested is expedited treatment of this FOIA request. This request qualifies for expedited treatment pursuant to 5 U.S.C. § 552(a)(6)(E) and applicable regulations. there is a compelling need for expedited processing of this request, namely an "urgency to inform the public concerning the actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II).

* * * * *

Thank you for your consideration of this request. If this request is denied in whole or in part, the requestor asks that the government justify all redactions by reference to the specific exemptions of FOIA. We expect the government to release all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny expedited processing or waiver of fees.

Please respond to Shoba Sivaprasad Wadhia, Director, Pennsylvania State University, Dickinson School of Law, 121C Lewis Katz Building, University Park, PA 16802, or by email at ssw11@psu.edu, or by phone at 814-865-3823.

Sincerely,

Shoba Sivaprasad Wadhia

Shoba Sivaprasad Wadhia
Clinical Professor of Law and
Director, Center for Immigrants' Rights
Pennsylvania State University
Dickinson School of Law
121C Lewis Katz Building
University Park, PA 16802

U.S. Department of Homeland Security
800 North Capitol Street NW, Stop 5009
Washington, DC 20536-5009



U.S. Immigration
and Customs
Enforcement

December 17, 2010

SHOBA WADHIA
PENNSYLVANIA STATE UNIVERSITY
121C LEWIS KATZ BUILDING
UNIVERSITY PARK, PA 16802

Re: ICE FOIA Case Request Number 2011FOIA1845

Dear Ms. Wadhia:

This letter is the final response to your Freedom of Information Act (FOIA) request, dated March 30, 2010, to the U.S. Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE) for:

- 1) Records regarding the following information from cases after January 1, 2003 in which deferred action status was granted:
 - a. number of individuals granted deferred action status
 - b. factors considered in each case
 - c. determinative factors in each case that deferred action status should be granted
- 2) Records regarding the following information from cases after January 1, 2003 in which an individual made a request for deferred action status:
 - a. number of individuals who made requests for deferred action status
 - b. number of individuals granted deferred action status
 - c. number of individuals denied deferred action status
 - d. status of cases in which deferred action as neither granted nor denied
 - e. reasons for denial or granting of deferred action status
 - f. factors taken into consideration to determine whether deferred action status should be granted or denied
- 3) Records regarding the following information from cases after January 1, 2003, in which an individual did not make a formal request to be considered for deferred action status, but was considered for deferred action status:
 - a. number of individuals considered for deferred action status who has not made a request
 - b. number of these individuals who were granted deferred action status
 - c. number of these individuals who were denied deferred action status
 - d. status of cases in which deferred action as neither granted nor denied
 - e. reason for denial or granting of deferred action status
 - f. factors taken into consideration to determine whether deferred action status should be granted or denied

- 4) Records regarding the following information from cases after January 1, 2003 in which an individual was denied deferred action status:
- a. number of individuals denied deferred action status
 - b. reasons for denial of deferred action status
 - c. factors taken into consideration to determine that deferred action status should be denied
- 5) Records regarding the following information from cases after January 1, 2003 in which an individual qualified as part of a group eligible for deferred action status:
- a. number of individuals who were in fact considered for deferred action status
 - b. number of these individuals who were granted deferred action status
 - c. number of these individuals who were denied deferred action status
 - d. status of cases in which deferred action as neither granted nor denied
 - e. reasons for denial or granting of deferred action status
 - f. factors taken into consideration to determine whether deferred action status should be granted or denied
 - g. number of individuals who request deferred action status

Your request has been processed under the FOIA, 5 U.S.C. § 552.

A search of the ICE Office of Enforcement and Removal Operations produced 1 Excel spreadsheet. We are granting you access to the attached spreadsheet under the FOIA, as amended, and DHS' implementing regulations, 6 C.F.R. Chapter I and Part 5. After carefully reviewing the responsive record, I determined that it is appropriate for public release. It is enclosed in its entirety; no deletions or exemptions have been claimed.

The Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at ogis@nara.gov or call 1-877-684-6448.

If you need to contact our office about this matter, please refer to case number **2011FOIA1845**. This office can be reached at (202) 732-0300 or (866) 633-1182.

Sincerely,



Catrina M. Pavlik-Keenan
FOIA Officer

Enclosure(s): 1 Spreadsheet

Number of Active Cases granted Deferred Action Status Since CY 2003

CY	Detained	Non Detained	Total
2003	0	117	117
2004	0	68	68
2005	0	62	62
2006	0	64	64
2007	0	71	71
2008	0	39	39
2009	2	34	36
2010	1	15	16
Total	3	470	473

As of IIDS November 29, 2010 as provided by the Statistical Tracking Unit.

Data only reflect Deferred Action Granted and Case Status Active (i.e. open cases). Data cannot be reported for Deferred Action Granted, Case Status inactive (i.e. closed cases).

ICE Exhibit C

12 0231

FILED

FEB 10 2012

Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

March 29, 2011

Associate General Counsel
Department of Homeland Security
FOIA Appeals
Washington, D.C. 20528

Dear Associate General Counsel:

Re: Freedom of Information Act Appeal of ICE FOIA Request 2011FOIA1845

This letter constitutes an appeal of ICE's response to the FOIA request, reference number 2011FOIA1845, on the following grounds:

- 1. The 60-day limitation on this appeal should be based on the date the response letter was actually sent by ICE.*

Appeals of an ICE FOIA determination are typically subject to a 60-day limitation based on the date of ICE's determination letter (ICE Website Legal Information, <http://www.ice.gov/about/legal.htm#foia>). However, in this case the records were sent on a CD without explanation or identification. A follow-up inquiry was made to ICE and the determination letter was sent in a response email dated February 9, 2011 (Exhibit B). The determination letter was dated December 17, 2010 (Exhibit C), but it did not accompany the records sent on that date. Thus, this appeal should be considered within the 60-day limitation based on the date the final response letter was actually sent, February 9, 2011.

- 2. ICE failed to locate additional records that are responsive to the request.*

The agency must carry out a reasonable search for records responsive to the FOIA request. 5 U.S.C. § 552(a)(3)(C); see also, Oglesby v. Army, 920 F.2d 57, 68 (D.C. Cir. 1990). This FOIA request consisted of twenty-five inquiries (Exhibit A). In response, ICE provided a single table containing summary information in response to one of the twenty-five inquiries (Exhibit D). Not only were no records provided in response to any of the twenty-four remaining inquiries, but no response was made to them at all.

Responsive records exist that were not included in the ICE's response. Specifically, records on deferred action are required to be maintained under the Detention and Removal Operations and Procedure Manual § 20.8(c). The Manual provides that all deferred action considerations be summarized using a Form G-312 and placed in the alien's A-file. Decisions regarding grants and denials of deferred action must also be in writing and signed by an agency official making the determination. Production of these records would be responsive to the original FOIA request, even if redaction were required to protect an individual's privacy

interests, as the purpose of the request is to identify potential patterns and trends in agency decision-making in deferred action cases. This information will be used in order to provide practical knowledge for those who may benefit from deferred action as well as to shed light on agency practice in this area. Because deferred action decisions are not made in a public forum, public scrutiny is necessary to ensure consistency of agency action. In both regards this information will benefit the agency by increasing efficacy and efficiency in immigration proceedings.

Prior to 2003, the records requested were made available to Leon Wildes, who submitted similar FOIA requests for records of deferred action. *See, Leon Wildes, The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 San Diego L. Rev. 819, at n. 23 (2004). Mr. Wildes requested and obtained records of 499 cases completed prior to 2003 involving deferred action from the regional BCIS offices. From these records, he was able to compile the data and distinguish the factors considered by BCIS in determinations of whether to grant or deny deferred action.

Additionally, the spreadsheet that was sent by ICE in response to the FOIA request itself indicates that records must exist from which the summary data contained in the spreadsheet was derived. For example, data may be gathered from databases containing records of Employment Authorization Documents (EADs) either applied for or granted under C.F.R. § 274a.12(c)(14), the deferred action category.

3. ICE's responses failed to provide the required notice of the right to appeal its decision.

5 U.S.C. § 552(6)(A)(i) requires that an agency "shall determine within twenty days after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore, and of *the right of such person to appeal to the head of the agency any adverse determination*" (emphasis added).

The initial response letter from ICE indicated that they were undertaking a search of records in response to the request. Ostensibly because the response was not a rejection, no notice of a right to appeal was included. However, in the final response, which did not address the majority of information requested and therefore acts as a constructive rejection, there is also no notice given of the right to appeal.

Based on the reasons above, this appeal should be granted and additional searches should be done to accommodate the FOIA request.

Please respond to Shoba Sivaprasad Wadhia, Director, Pennsylvania State University, Dickinson School of Law, 121C Lewis Katz Building, University Park, PA 16802, or by email at ssw11@psu.edu, or by phone at 814-865-3823.

Sincerely,

U.S. Department of Homeland Security
500 12th St. SW; STOP 5009
Washington, DC 20536-5009



U.S. Immigration
and Customs
Enforcement

September 27, 2011

SHOBA WADHIA
PENNSYLVANIA STATE UNIVERSITY
121C LEWIS KATZ BUILDING
UNIVERSITY PARK, PA 16802

RE: OPLA11-181, 2011FOIAFOIA14736

Dear Ms. Wadhia:

This is in response on remand to your letter dated March 29, 2011, appealing the adverse determination in response to your Freedom of Information Act/Privacy Act (FOIA/PA) request. Your request asked for the following records regarding deferred action, including:

1. records regarding the following information from cases after January 1, 2003 in which deferred action status was granted:
 - a. number of individuals granted deferred action status
 - b. factors considered in each case
 - c. determinative factors in each case that deferred action status should be granted
2. records regarding the following information from cases after January 2, 2003 in which an individual made a request for deferred action status:
 - a. number of individuals who made requests for deferred action status
 - b. number of individuals granted deferred action status
 - c. number of individuals denied deferred action status
 - d. status of cases in which deferred action as neither granted nor denied
 - e. reasons for denial or granting of deferred action status
 - f. factors taken into consideration to determine whether deferred action status should be granted or denied
3. records regarding the following information from cases after January 1, 2003, in which an individual did not make a formal request to be considered for deferred action status, but was considered for deferred action status:
 - a. number of individuals considered for deferred action status who had not made a request
 - b. number of these individuals who were granted deferred action status
 - c. number of these individuals who were denied deferred action status
 - d. status of cases in which deferred action was neither granted nor denied
 - e. reasons for denial or granting of deferred action status
 - f. factors taken into consideration to determine whether deferred action status should be granted or denied
4. records regarding the following information from cases after January 1, 2003 in which an individual was denied deferred action status:
 - a. number of individuals denied deferred action status

- b. reasons for denial of deferred action status
 - c. factors taken into consideration to determine that deferred action status should be taken
5. records regarding the following information from cases after January 1, 2003 in which an individual qualified as part of a group eligible for deferred action status:
- a. number of individuals who were in fact considered for deferred action status
 - b. number of these individuals who were granted deferred action status
 - c. number of these individuals who were denied deferred action status
 - d. status of cases in which deferred action as neither granted nor denied
 - e. reasons for denial or granting of deferred action status
 - f. factors taken into consideration to determine whether deferred action status should be granted or denied
 - g. number of individuals who request deferred action status

U.S. Immigration and Customs Enforcement (ICE) initially denied your March 30, 2010 request by returning a search of the Office of Enforcement and Removal Operations (ERO), which produced a spreadsheet of responsive records. On December 17, 2010, ICE FOIA provided the final response to your FOIA request and produced all records located that were responsive to your request. In your letter dated March 29, 2011, you appealed the adequacy of the search. In a letter dated June 3, 2011, your case was remanded to ICE FOIA for an additional search.


Your request has been processed under FOIA, 5 U.S.C. § 552. On remand, ICE conducted a search of ICE Office of the Principal Legal Advisor (OPLA). While an adequate search was conducted, the search on remand did not produce any records responsive to your request.

The Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at ogis@nara.gov or call 1-877-684-6448.

This decision is the final action of the Department of Homeland Security concerning your FOIA/PA request. Inasmuch as you consider this to be a denial of your appeal, you may obtain judicial review of this decision pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B) in the United States District Court in the district in which you reside, or in which the agency records are situated, or in the District of Columbia.

Should you have any questions regarding this appeal closure, please contact ICE at ice-foia@dhs.gov. In the subject line of the email please include the word "appeal", your appeal number, which is OPLA 11-181 and the FOIA case number, which is 2011FOIA14736.

Sincerely,


Catrina M. Pavlik-Keenan
FOIA Officer